82-2046

No.

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IN THE

Supreme Court of the United States

October Term, 1982

UNITED TRANSPORTATION UNION,
Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, NEW JERSEY RAIL OPERATIONS, INC.,
Respondents,

and

CONSOLIDATED RAIL CORPORATION,
Rule 19 Party

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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QUESTION PRESENTED

Whether a state (New Jersey or Pennsylvania) commuter authority, the Federal Court below and a Presidential Emergency Board are bound by the clear prior right seniority preservation language of Congress contained in the Northeast Rail Service Act of 1981, or whether the federal and state agencies are free to establish a new railroad seniority system the effect of which is to deprive, unconstitutionally, all affirmative action women and minority hirees of their jobs?*

*There are no other parties involved herein than those contained in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

The petitioner, United Transportation Union (UTU), respectfully prays that a writ of certiorari issue to review the order of the Special Court, Regional Rail Reorganization Act of 1973 entered in this case on May 25, 1983.

Petitioner respectfully incorporates by reference herein petitioner's previous petition for a writ of certiorari to this Court, denied on substantially the same brief as here, during the January Term, 1982, No. 82-1189. However, the petition submitted for the January Term (hereinafter Jan. Pet.) was from a non-final order of the Court below. This is a petition to a final order of the Court below in this same case.

OPINION BELOW

The opinion and order of the Special Court is supplied in the Appendix as App. A.

JURISDICTION

This petition is governed by §1152(b) of the Northeast Rail Service Act of 1981 (hereinafter NERSA), which provides that judgment of the Special Court shall be reviewable only upon petition for a writ of certiorari to this Court to be filed not more than twenty (20) days after the entry of an *order* of the Special Court (App. D, 7a-8a, Jan. Pet.).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of NERSA, including pertinent amendments to the Rail Passenger Service Act (RPSA) and the Regional Rail Reorganization Act of 1973 (hereinafter 3R Act), have previously been set forth (App. E, 9a-11a, Jan. Pet.).

STATEMENT

Proceedings Below

In the past, Consolidated Rail Corporation

(hereinafter Conrail), has provided commuter service to the New Jersey and Pennsylvania area under a subsidiary arrangement with the State of New Jersey and Southeastern Pennsylvania Transportation Authority (hereinafter SEPTA) as provided by Section 304 of the 3R Act. Pursuant to Section 1136 of NERSA, Conrail was legislated out of the commuter rail business. The commuter lines of Conrail throughout the United States have been taken over by Amtrak Commuter or local commuter authorities at the options of the States involved.

Petitioner, UTU, is a labor union which represents many of the operating crews of the trains previously operated by Conrail which trains have been taken over by New Jersey Rail Operations, Inc., (hereinafter NJT) and SEPTA, pursuant to NERSA.

Respondents in this case are SEPTA and a subsidiary of the NJT which is a public corporation chartered pursuant to the laws of the State of New Jersey to provide commuter service in that state. NJT and SEPTA are both "commuter authorities" as defined in Section 1135(a)(3) of NERSA.

NERSA amended RPSA in order to provide for the orderly transfer of employees from Conrail to the new commuter authorities. This case involves Sections 508 through 510 which prescribe the method under which Conrail commuter employees are to be absorbed by Conrail's successors.

More particularly, this case involves the preservation of seniority rights of the UTU members as their employer changes from Conrail to NJT and SEPTA. Congress provided that the new employers should

maintain the employees' prior seniority rights, Sec. 508(c)(5)(7). Each of the governmental bodies below, i.e., NJT, SEPTA, Conrail, Referee Kasher, Referee Quinn, the Presidential Emergency Board and the 3-judge 1152(a) Court, have defied the Congressional directive and held that a new form of seniority shall prevail and that after January 1, 1983 prior right seniority should no longer apply.

Pursuant to Section 508(a), the new authorities, Conrail and the UTU attempted to negotiate a mutually satisfactory implementing agreement. By August 1, 1982 no such agreement had been reached. Section 508(d)(1) requires that, within five days, the parties select a neutral referee in the event that implementing agreement negotiations are not completed by August 1, 1982. The parties were also unable to select an arbitrator by August 6th. Accordingly, pursuant to Section 508(d), the National Mediation Board appointed Mr. Kasher on September 7, 1982 to resolve all implementing agreement disputes regarding NJT and Dr. Quinn to resolve all implementing disputes relating to SEPTA. Referee Kasher entered his decision on October 15, 1982 (App. F, 12a-14a, Jan. Pet.). He found that after January 1, 1983 there would no longer be a prior right seniority system. Rather, there would be a new form of seniority system. The UTU moved for clarification and reconsideration of that decision on October 20, 1982. Referee Quinn proffered identical findings and added a five year limitation to the seniority flow back right.

There being no Kasher or Quinn reconsideration, the UTU filed its complaint in this case on November 12, 1982 raising objections to the two awards insofar as they established a new form of seniority and scrapped the prior right seniority system (App. G, 15a-16a

Jan. Pet.) which had been mandated by Congress.

On December 1, 1982 the President's Emergency Board adopted the NJT presentation which contained the Kasher new form of seniority (App. H, 17a-19a Jan. Pet.).

On December 6, 1982 on motion to clarify and reconsider, Mr. Kasher reaffirmed his original decision and held that the old form of prior right seniority would no longer prevail, that although the employees would move over to NJT according to the old seniority system, once over there, a new form of seniority would be employed (App. I, 20a-21a Jan. Pet.).

On December 10, 1982, the UTU moved the court below for a preliminary injunction holding the seniority status quo, i.e., enjoining the scrapping of the prior right seniority system and enjoining the implementation of the Kasher new form of seniority system based solely upon date of hire.

On December 21, 1982 the Court below entered an order with decision to follow, denying the preliminary injunction and affirming the Kasher abolition of prior right seniority system.

A petition for a writ of certiorari was made to this Court on the January Term from the non-final Order of the Court below of December 21, 1982. Certiorari was denied by this Court on March 7, 1983.

The Court below, after rehearing, entered a final Order dismissing the entire complaint of the UTU on May 25, 1983 (App. A).

It is from this final Order that this petition for a

writ of certiorari is made.

FACTS

The facts are contained in the moving affidavit of UTU General Chairman Charles P. Jones (App. J, 22a to 30a Jan. Pet.) the intervenor Suzanne Woodard (App. K, 31a-33a Jan. Pet.) and the moving affidavit of UTU General Chairman Charles P. Jones (App. B) and are not substantially disputed except for the issue of whether preservation of prior rights was "possible." Respondents alleged that the preservation of prior rights was impossible. No factual hearing was permitted below on this point.

There are approximately 610 UTU employees operating the trains in New Jersey. These positions have been held by Conrail employees. On January 1, 1983 these positions became those of NJT. The legislated spin off of the New Jersey rail system from Conrail to NJT is completed. The facts as to SEPTA are substantially the same.

The seniority system before the spin off was based on prior and prior prior right system rather than being based solely on the employee's date of hire. Prior right means that an employee has territorial seniority to the original railroad of employment.[1] Prior prior rights refer to an employee's territorial rights which existed through two mergers, e.g., a Conrail employee who had originally hired on the old Pennsylvania Railroad would be said to have prior prior rights to the old Pennsylvania Railroad territory and

1. Conrail, formed on April 1, 1976 by Congressional merger of bankrupt railroads in the northeast corridor.

prior rights to the Penn Central territory.

An employee's prior and prior prior rights were well understood by the company, the unions and the personnel. With each merger over the past four decades these rights were protected by Congress and the negotiators.

Congress in legislating the NERSA spin off specifically provided that the "... Commuter authority ... shall, to the extent possible, preserve their prior seniority rights," (508[c][5]) and "ensure the retention of prior seniority on Conrail ..." (508[c][7]).

It could not be contended sensibly that it would be impossible or even difficult to let the UTU positions continue their prior seniority as it was on December 31, 1982. The prior and prior prior right seniority system had continued through multiple mergers, it could continue through a spin off. The seniority status quo could have been maintained. Defendants denied this issue, but no factual hearing was permitted on this issue.

Referee Kasher thought a straight date of hire seniority system would be "better" and directed that after January 1, 1983 there would no longer be a prior right seniority system. Referee Quinn maintained an identical position with the added restriction of a five year limit within which employees could exercise their flow back rights.

This bold directive of the referees in the face of the contrary Congressional directive that prior rights should be preserved was sanctioned by the court

below in affirming both awards. Continuing the flaunt of the congressional directive, the President's Emergency Board recommended that prior rights end.

The consequences of abolition of the prior rights system were drastic and pointed out to the Court below in the affidavits of Charles Jones and Suzanne E. Woodard. Employees hired after February 18, 1965 would make neither the Kasher nor Quinn list. All black and female employees hired pursuant to affirmative action programs would not be hired according to the new seniority system. The new railroad employer would have an all male, practically all white, work force. The minority employees would preserve their jobs if the congressionally mandated prior right system were continued, but it was not.

REASONS FOR GRANTING THE WRIT

1. The States of New Jersey and Pennsylvania, the Presidential Emergency Board and the Judicial Contradiction of a Simple Congressional Directive to Preserve Prior Seniority Rights Constitutes a Reviewable Conflict Between States and Governmental Agencies at the Highest Level and Portends Labor Strife Throughout the Railroad Labor Force of the United States.

The decision below is in direct conflict with a long line of decisions of this Court which hold that in all cases involving statutory construction, the starting point must be the language employed by the Congress. See, *American Tobacco Co. v. Patterson* __U.S.__, 71 L.Ed. 2d 337 (1979). It also conflicts with this Court's view that legislative purpose is expressed by the ordinary meaning of words used in a statute,

and that the language used is ordinarily conclusive. *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980); Richards v. United States,* 369 U.S. 1, 9 (1962). What the Court below did in this case at the urging of the State of New Jersey and Pennsylvania, was to ally itself with Referees and the Presidential Board so as to act as superlegislators and decide a different and "better" seniority system in direct contradiction to the Congressional directive to preserve the prior right seniority system of the UTU employees. This is clearly contrary to past holdings of this Court. *American Tobacco Co. v. Patterson, supra,* 71 L. Ed. 2d at 757, n. 6; *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965).

The smooth transition from Conrail to the commuter authorities and the continued efficient operation of the subject rail lines explicitly envisioned by the Congress in NERSA hangs in the balance. Unions cannot stand by and see seniority rights eroded in direct contradiction to the Congressional intent to preserve prior rights. The unions involved have read Congress' dictates, i.e. "the ... Commuter authority ... shall, to the extent possible, preserve their seniority rights" (508[c][5]).

Dr. Quinn maintains that these rights can be preserved, but only for five years. This arbitrary time limit remains in direct conflict with Congressional intent. Further, on April 1, 1983, respondent NJT entered into a contract with engineers employed by NJT which provided engineers the right to ebb and flow between and among NJT, Conrail and AMTRAK. To permit retention of these rights as to one class of employees (engineers) while denying these rights to another class (conductors and flagmen) is unacceptable.

From the unions viewpoint, after NERSA enactment, the Unions' prior rights were safe. Next the unions were met with the notice of the States of New Jersey and Pennsylvania that they did not intend to grant any prior rights; next, the Kasher and Quinn decisions denied prior right seniority protection; next the Presidential Board sided with the States, and finally, the Court below affirmed the abolition of prior rights. To expect the union leadership, in the face of such high level governmental contradiction, to lead its enraged membership through a smooth transition is unrealistic.

The importance of the issue far exceeds the expected labor turmoil generated by the executive and judicial meddling in the prior right seniority area which Congress had specifically preserved. The issue involves the freedom of Congress, within the bounds of the Constitution, to legislate toward such ends as it chooses without interference from the Judiciary, the states or Presidential boards. This is particularly so given the intensive federal concern with railroads in general. See *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Such high level conflict between the three branches of the United States government and the states should be reviewed by this Court.

2. The Implementation of the New Seniority System and Elimination of the Prior Right System by the Efforts and/or Concurrence of the States of New Jersey and Pennsylvania Presidential Emergency Board and the Court Below Will Result in *De Facto* Racial and Sexual Discrimination in Violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981 and 1983, the Fifth, Thirteenth and Fourteenth Amendments to the U.S. Constitution.

The affidavit of Charles Jones, Suzanne E. Woodard, Intervenors rule 24, Pleading (App. L, 34a Jan. Pet.) as well as the memorandum and argument before the Court below raised the racial and sexual discrimination issues. The failure of the Court below to follow the dictate of Congress to preserve prior rights resulted in the loss of jobs of the black, Hispanic and female employees hired pursuant to the affirmative action programs.[2]

Implementation of the new seniority system would leave a completely male work force and would eliminate virtually all of the minority employees hired pursuant to affirmative action programs. Of the minority men who will remain (only a few) they will be deprived of their prior seniority rights and will thereby stand at the bottom of the seniority list. For any and all seniority purposes they will be second class employees.

The abolition of prior rights results in state and

2. The proceeding below afforded no opportunity for proof or cross examination other than the presentation of affidavits and exhibits. The weighty issues presented to the three judge court below were finally decided on papers alone.

federally induced *de facto* sexual and racial discrimination in violation of the Constitution and Civil Rights Act. Certiorari ought be granted.

CONCLUSION

The decision below is in direct conflict with decisions of this Court that plain and unambiguous Congressional language must be given effect. It concerns the fundamental question of the freedom of Congress to state what it means free from judicial, state and Presidential Board interference. It concerns state, judicial and Presidential Board implementation of and/or concurrence in an unconstitutional seniority system. A writ of certiorari should issue to review the final order and opinion of the Special Court.

Respectfully submitted,

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Attorneys for the
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Dated: June 14, 1983

APPENDIX "A"
FINAL ORDER BY SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973 DATED MAY 25, 1983

UNITED TRANSPORTATION UNION,

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party,

and

UNITED TRANSPORTATION UNION, GENERAL COMMITTEE OF ADJUSTMENT, CONRAIL NORTH; and SUZANNE E. WOODARD, et al.,

Intervenors.

Before GASCH, Presiding Judge, and BRYANT and WEINER, Judges.

MEMORANDUM ORDER

WEINER, Judge:

This action was begun on November 12, 1982, when representatives of the United Transportation Union (UTU) filed a petition for review of the separate awards of two arbitrators made pursuant to §508 of the Rail Passenger Service Act (RPSA) as amended by §1145 of the Northeast Rail Service Act of 1981 (NRSA), Pub. L. No. 97-35 (August 13, 1981), 95 Stat. 643, 669. 45 U.S.C. §588. Paragraph 16 of the petition challenges the seniority provisions of the October 10, 1982 award and implementing agreement of Dr. Francis X. Quinn resulting from an arbitration proceeding among UTU, Southeastern Pennsylvania Transportation Authority (SEPTA) and Consolidated Rail Corporation (Conrail). Paragraph 18 of the petition challenges the differing seniority provisions of the October 14, 1982 award and implementing agreement of Mr. Richard R. Kasher resulting from an arbitration proceeding among UTU, New Jersey Transit Rail Operations, Inc. (NJT), and Conrail.

Other aspects of the awards of these two neutral referees had been challenged in two previous cases before this Court. We dismissed a petition for review of Referee Kasher's award on other grounds in *Ner Jersey Transit Rail Operations, Inc. v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; et al.*, 550 F. Supp. 1327 (Sp. Ct. R.R.R.A. 1982). (*NJT v. IBB*). A petition to review other provisions of Dr. Quinn's award was dismissed in *American Railway & Airway Supervisors Association, v. SEPTA and Conrail*, 551 F. Supp. 688 (Sp. Ct. R.R.R.A. 1982) (*ARASA v. SEPTA*). On

February 9, 1983, the Court issued its first decision in this case dismissing ¶18(a) of the petition and disposing of other issues then before it. *United Transportation Union v. Southeastern Pennsylvania Transportation Authority, et al.*, 555 F. Supp. 1382 (Sp. Ct. R.R.R.A. 1983), *cert. denied*, __U.S.__, 103 S. Ct. 1275 (1983) (*Mem. Op.*). The *Mem. Op.* in this action and the decisions in *NJT v. IBB* and *ARASA v. SEPTA* have discussed in great detail the statutory framework of §508 of RPSA and the factual background of the Kasher and Quinn arbitration proceedings as well as the identity and relationship of the parties.

This action is now before the Court on several motions of the parties. On March 31, 1983, respondent NJT moved for an expedited determination of the issues presented in ¶¶18(b) and (c) of the petition and moved to dismiss the petition as to NJT. On April 6, 1983, the Court issued an order scheduling such an expedited determination. In response to that order, petitioner UTU ("petitioner") moved for a "directed verdict" on the issues presented in ¶¶16(b), (c) and (d) as well as ¶¶18(b) and (c) of the petition and, in the alternative, for an evidentiary hearing. On April 21, 1983, respondent SEPTA answered petitioner's motion and filed its own motion to dismiss ¶¶16(b), (c) and (d). Rule 19 party Conrail responded to the motions of NJT and petitioner urging the Court to dismiss the petition. Intervenor UTU, General Committee of Adjustment, Conrail North submitted a memorandum in support of NJT's motion to dismiss. Oral argument on these motions was heard on April 26, 1983. At that argument counsel for Conrail and SEPTA requested that the Court also dismiss ¶16(a), which is the only remaining portion in the petition requesting relief. For the reasons given below, the Court denies petitioner's

motion and grants the motions of NJT and SEPTA and the request of Conrail and dismisses the remaining portions of the petition for review.

This case is the fourth action requesting a review of the award of a neutral referee made pursuant to §508. In addition to review of the awards in this case and in *NJT v. IBB* and *ARASA v. SEPTA*, the award of Neutral Referee Fred Blackwell was reviewed and upheld in *United Transportation Union v. Metro-North (Commuter Rail Division of the Metropolitan Transportation Authority)*, 554 F. Supp. 429 (Sp. Ct. R.R.R.A. 1983). (*UTU v. Metro-North*). In those prior cases and in our *Mem. Op.* we have considered many of the claims made by petitioner.

The Court's power to review the award of a neutral referee is limited to considering whether the referee failed to comply with the statute's requirements, failed to act within his jurisdiction, or acted corruptly. *Mem. Op.*, 555 F. Supp. at 1387; *NJT v. IBB*, 550 F. Supp. at 1329; and *ARASA v. SEPTA*, 551 F. Supp. at 691. Petitioner contends that Referees Kasher and Quinn failed to act within their jurisdiction by failing to preserve prior seniority rights. Paragraphs 16 and 18 are subdivided to list the specific aspects of the awards which petitioner contends are unlawful. These paragraphs of the petition are:

> 16. The seniority provisions of the Quinn Award and Implementing Agreement are beyond the scope of the neutral referee's jurisdiction under Section 508 of the RPSA in that they:
>
> (a) Create a limited Order Selection List as the only standard of seniority of SEPTA for Conrail employees and specifically direct that seniority prior

rights will not be applicable after January 1, 1983;

(b) Provide that the flow back seniority rights from SEPTA to Conrail will end on November 1, 1987;

(c) Eliminate the prior seniority rights of the UTU employees to ebb and flow between SEPTA passengers and Conrail freight service; and

(d) Terminate all SEPTA seniority for some employees returning to Conrail.

All specifically prohibited and contraindicated by the Congress in Section 508(c)(5) and (7) of the RPSA, which subsections indicate that implementing agreements should protect prior seniority "to the extent possible" (5), and should insure the protection of prior seniority rights (7).

18. The seniority provisions of the Kasher Award and Implementing Agreement are beyond the scope of the neutral referee's jurisdiction under Section 508 of RPSA in that they:

(a) Created a Limited Order Selection List of UTU employees only for the initial purpose of going over to NJT. Once over, all prior seniority rights end and, contrary to Section 510, establishes a new type seniority system (dove tailed company-wide seniority). The Kasher award changes the seniority from job run to company run seniority, drastically changing and affecting the seniority of all transferring personnel in contradiction to the intent of NERSA. The award specifically directs that seniority prior rights will not be applicable after January 1, 1983;

(b) Eliminate the prior seniority right of the employees to ebb and flow between NJT passenger and Conrail freight service;

(c) Terminate all NJT seniority for some employees returning to Conrail.

All specifically prohibited and contraindicated by the Congress in Section 508(c)(5) and (7) of the RPSA, which subsections indicate that implementing agreements should protect prior seniority "to the extent possible" (5), and should insure the protection of prior seniority rights (7).

In ¶16(a) petitioner complains that Referee Quinn established a limited order selection list for exercise of seniority. In this instance the Quinn award affects prior seniority of the transferred employees to a lesser extent than the more sweeping changes in Referee Kasher's award. Under the Kasher award the limited order selection list was used to create a company wide seniority system. *See Mem. Op.*, 555 F. Supp. at 1384-87. We found that Referee Kasher acted completely within his jurisdiction and in accordance with the statute's requirements. Petitioner has not presented, nor have we discovered, any reason to not so find with regard to Referee Quinn and the claims in ¶16(a).

The substance of claims in ¶¶16(c) and (d) and 18(b) and (c) are identical. Petitioner asserts that Dr. Quinn and Mr. Kasher acted outside of their jurisdiction by impermissibly terminating SEPTA and NJT seniority for those employees who voluntarily exercised their Conrail seniority to return to freight service. Such a claim was discussed and rejected in *UTU v. Metro-North.* In that case the precise claim was that §1165 of NRSA controlled "flow back" rights of former Conrail employees transferred to commuter authorities. The Court held that §1165 was not applicable and that §508(c)(7)(A) of RPSA was the statutory provision governing the movement of employees from commuter authorities to Conrail. That section provides commuter authority employees with the opportunity to return voluntarily to Conrail once every six months. Section 508(c)(7)(A) does not require that the award grant the opportunity to "flow back" to the commuter authority once the employee has exercised freight seniority and returned to Conrail. 554 F Supp. at 432-33. Petitioner has made no at-

tempt to distinguish the Court's decision in *UTU v. Metro-North* from the instant action; and, we do not find it distinguishable. For the same reasons as stated in *UTU v. Metro-North* we now hold that the Quinn and Kasher awards were within their jurisdiction and completely in accord with §508(c)(7)(A).

Petitioner's claim in ¶16(b) is that the Quinn award additionally restricts employees' rights in that it places a five year limit on the ability to exercise Conrail freight seniority. Petitioner contends the five year limitation serves no purpose and exceeds the referee's jurisdiction. SEPTA and Conrail counter with the assertion that imposition of a five year limitation is both reasonable and within a referee's jurisdiction to impose. They point out that the five year limitation was adopted by Dr. Quinn from an August 1, 1982, implementing agreement freely entered into by the non-operating crafts and Metro-North, which Conrail submitted as a model. Regardless of our appreciation of the necessity or wisdom of the five year limitation to the exercise of freight seniority rights, we find that Referee Quinn did not exceed his jurisdiction by accepting the submission of two of the parties and including such a provision in his §508 award.

Petitioner has also moved for an evidentiary hearing to determine the factual issues raised in its petition. However, petitioner has not directed the Court to any fact, which if established, would affect the decision in this case. Considering the applicable standard of review, we find an evidentiary hearing is unwarranted.

Accordingly, it is by the Court this 25th day of May, 1983,

ORDERED that petitioner's motion for a directed verdict or for an evidentiary hearing is denied; and it is hereby further,

ORDERED that the motions of SEPTA and NJT to dismiss are granted and ¶¶16(a), (b), (c) and (d) and ¶¶18(b) and (c) are hereby dismissed.

s/Oliver Gasch
Oliver Gasch
Presiding Judge

s/William B. Bryant
William B. Bryant, Judge

s/Charles R Weiner
Charles R. Weiner, Judge

APPENDIX "B"
AFFIDAVIT OF CHARLES P. JONES
DATED APRIL 11, 1983

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

UNITED TRANSPORTATION UNION

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, NEW JERSEY TRANSIT RAIL OPERATIONS, INC.,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

STATE OF PENNSYLVANIA)
) ss:
COUNTY OF PHILA.)

CHARLES P. JONES, being duly sworn, says:

I am the General Chairman of the United Transportation Union ("UTU") and represent many of the operating crews of trains which were operated

by Consolidated Rail Corporation ("CONRAIL") which trains have been taken over by New Jersey Transit Rail Operations, Inc. ("NJT") and the Southeastern Pennsylvania Transportation Authority ("SEPTA") as of January 1, 1983, pursuant to the National Rail Service Act of 1981 ("NERSA").

I incorporate by reference and adopt herein facts and arguments as previously enunciated and hereby supplement my prior affidavit of December 9, 1982.

I make this affidavit in support of petitioner UTU's petition for, directed verdict in favor of petitioner, or for a factual hearing of paragraphs 16(b), (c), (d) and 18(b), (c) of the original petition; and in opposition to respondent NJT's Motion to Dismiss.

Petitioner UTU recognizes that respondent NJT's Motion to Dismiss is as against New Jersey Transit Rail Operations, Inc. However, respondent NJT's Motion effectively calls forward all issues which as yet remain undecided. Therefore, if the Court is to decide the instant motion, petitioner UTU urges that the Court comprehensively decide all the remaining issues.

The central issue before the Court is that of a railroad employee's right to flow freely among the several railroads involved herein. Respondent NJT has contended that this is an inefficient system, "impossible" to implement or manage.

Respondent NJT's assertion that it is incapable of maintaining this employee right of free flow, a right recognized and upheld for more than twenty-five years and explicitly protected by the Congress of the

United States, is utterly false. Free flow is not only possible, but has been an actual seniority right for three generations of railroads. In fact, NJTRO itself clearly recognized such right and certainly the possibility when it entered into an Agreement with the Brotherhood of Locomotive Engineers providing for the right of free flow, albeit on a restricted basis.

Metro North, too, recognized such right and possibility when it entered into an Agreement with the General Committees for essentially the same right.

Additionally, the obvious intent of Congress to preserve the prior rights of free flow is evidenced in the communication from the Honorable James J. Florio, Exhibit A annexed hereto.

Therefore, awards by neutral referees concerning the free flow of employees should "to the extent possible, preserve their prior seniority rights." NERSA, Section 508 (c)(5).

This right of an employee to flow freely among the involved railroads is a job freedom which has been honored and carried over to each new railroad concern merger after merger. It has endured because it is a foundation uponw hich the railroad employee builds his life and service to his employer. Thus, a railroad employee who gave years of difficult, hazardous labor to the Erie-Lackawanna, Penn Central, Conrail or Central of New Jersey railroads received more than a paycheck in consideration for the expertise gained during those years; the employee received certain, well-defined seniority rights as well as a paycheck. These seniority rights of free flow were part of the con-

sideration given to the employees in return for the work performed over many years.

These rights were maintained during the creation of Conrail from predecessor railroads, evidenced by the implementing agreement between Conrail and the UTU dated November 11, 1982. These rights received Congressional protection through NERSA, Section (c) (5). These rights were maintained in the implementing agreements between the authorities named herein as the agreements permit UTU employees to bid into jobs on the new authorities.

That these prior rights of free flow are integral and indispensable is obvious. They have been protected by the railroads, the employees, Congress and the unions consistently throughout this century. Now, without adequate reason and based solely upon a mountain of paper, these rights have been severely and suddenly abridged by the awards of Mr. Kasher and Mr. Quinn.

Petitioner UTU attempted various legal means to correct this serious thwarting of a clear and explicit Congressional directive, to no avail. The State of New Jersey and the Presidential Board also flaunted this mis-interpretation of Congressional intent.

It cannot be stressed enough that respondent NJT's position concerning the prior rights of free flow—that they are impossible to maintain—is wholly untenable. These rights are not a worn tradition to be discarded but a proven and desirable system. Free flow rights effectively expand the seniority of each employee to other employers. For employers, this results in a vast network of ready employees and

greater productivity. For employees, the retention of these rights, translates into enhanced job security, growth and motivation.

For example, an employee who lists twenty-fifth from the bottom of the seniority roster on NJT may be but one layoff away from being without work. However, with free flow this same employee would list much farther away from the bottom of the broad based (multiple railroad) seniority roster, his position insured by these time-proven rights. This is a substantial employee right and must not be allowed to erode. However, such will be the result should the awards of Mr. Kasher and Mr. Quinn be left unchanged.

Both awards severely restrict employee flow back rights in that they provide for a one time flowback only. Mr. Quinn's award is unique in that it imposes an additional five year limitation concerning any employee movement, an abridgement beyond those of Mr. Kasher's award. This five year time limit upon these already truncated rights was unsolicited and arbitrary. SEPTA, Conrail, the UTU and Congress all anticipated that flow back rights would be continued in perpetuity. No interested party requested *any* form of time limit to be applied against rights. The limitation is an improper act of legislation by an arbitrator. An explanation as to the creation of this time limit no doubt would aid in the disposition of these issues, yet Mr. Quinn proffered no rationale for his acts.

Free flow rights have existed for decades and the erosion of these rights is not a matter for short cut procedure. It is an issue of grave import involving thousands of people in futuro. The very least the issues deserve is an evidentiary hearing. Disposition

of these issues merely upon the filing of papers is an abuse as serious as the elimination of the heretofore protected employee free flow rights.

WHEREFORE, affirmant respectfully requests that the Court enter an order:

1. setting aside those provisions of the neutral referees' awards which limit UTU employees' prior seniority and ebb and flow rights, or in the alternative remand those awards for further proceedings before the respective neutral referees consistent with their jurisdiction under Section 508 NERSA, and

2. for the further and different relief as the Court may deem necessary and proper.

s/Charles P. Jones

CHARLES P. JONES

Subscribed and sworn to
April 11th, 1983

s/Shirley M. Block
Notary Public

Mr. Charles P. Jones
General Chairman
United Transportation Union
3 Penn Center Plaza
Philadelphia, Pennsylvania 19102

Dear Mr. Jones:

I understand some question has been raised regarding the flow back provisions of the Northeast Rail Service Act of 1981 (NERSA). I am pleased to explain the intent of that provision.

Section 1145 of NERSA added a new section 508 to the Rail Passenger Service Act. Section 508 requires an implementing agreement between commuter authorities that intend to operate commuter service, such as NJ Transit or SEPTA, and representatives of the various crafts or classes of employees of Conrail. Section 508(c)(7) requires that the implementing agreement "ensure the retention of prior seniority on Conrail of employees transferring to . . . a commuter authority . . . " Furthermore, such agreement must "provide employees transferred to . . . a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights . . . "

This provision was intended to protect the freight seniority of employees who transferred to the commuter agencies such as SEPTA or NJ Transit. It was

also intended to provide for maximum flexibility to the employees involved by giving them the right to bump back into Conrail at least once every 6 months. Certainly, the ability to flow back and forth between a commuter authority and Conrail once every six months is consistent with the flexibility intended by the Act.

I hope this information is helpful. Please feel free to contact me again if I can be of assistance.

Sincerely,

s/James J. Florio
James J. Florio, Chairman
Subcommittee on Commerce,
Transportation and Tourism

JJF:rhs

NO. 82-2046

AUG 6 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

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Counter-Statement of Question Presented

Whether the Special Court, Regional Rail Reorganization Act, properly upheld the decision of a neutral referee, pursuant to 45 U.S.C. §588, that employees electing to transfer to the Consolidated Rail Corporation (Conrail) shall have no further right to return to employment with a commuter authority, where the statute provides for a right to transfer to Conrail but is silent on any further right to transfer to a commuter authority.

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Statutes Cited

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NO. 82-2046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

Counter-Statement of the Case

This is the third time this matter comes before the Court on a Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973. The instant petition was filed on behalf of the petitioner below, the United Transportation Union ("UTU"), to review the May 25, 1983, Order of the Special Court dismissing paragraphs

16 (a), (b), (c) and (d) and 18(b) and (c) of the UTU's Petition for Review challenging a portion of implementing awards, made pursuant to 45 U.S.C. §588(d), for the transfer of employees from the Consolidated Rail Corporation (Conrail) to respondents NJ Transit Rail Operations, Inc.[1] (NJTRO), and Southeastern Pennsylvania Transportation Authority (SEPTA). Paragraph 16 of the Petition for Review sought relief against SEPTA, while paragraph 18 sought relief against NJTRO. This brief is submitted on behalf of respondent NJTRO in opposition to the UTU's Petition for a Writ of Certiorari.

Paragraph 18(a) of the Petition for Review challenged the seniority roster established by the award of neutral referee Kasher, pursuant to §508(c)(5) of the Rail Passenger Service Act, for the transfer of employees from Conrail to NJTRO. 45 U.S.C. §588(c)(5). Paragraphs 18(b) and (c) challenged the same award because it does not contain a provision permitting former Conrail employees to move back and forth between NJTRO and Conrail after they make an initial choice between the two for employment after January 1, 1983. (Ra2).[2] Prior to the instant petition, this same matter was the subject of a Petition for a Writ of Certiorari by the UTU, petitioner below, from the Special Court's denial of a preliminary injunction with respect to paragraph 18(a) of the Petition for Review. *See United Transportation Union* v. *Southeastern Pennsylvania Transportation Authority*, 555 F. Supp. 1382 (Sp. Ct. R.R.R.A., 1983), *cert.* den. —— U.S. ——, 105 S. Ct. 1275 (1983). (UTU v. SEPTA). That Petition for Certiorari was denied in a March 7, 1983 or-

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[1] This is the legal name of respondent. The UTU improperly named respondent in its petition below, as did petitioner here.

[2] "Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari. "Ra" refers to the Appendix attached to this brief.

der of this Court. *United Transportation Union* v. *Southeastern Pennsylvania Transportation Authority,* No. 82-1189.[3] Following that denial, Suzanne Woodard, a plaintiff before the Special Court, filed a Petition for a Writ of Certiorari of the February 9, 1983 final order of the Special Court dismissing paragraph 18(a) of the Petition for Review. That petition, in which petitioner UTU joined, was denied on June 20, 1983. *Woodard* v. *Southeastern Pennsylvania Transportation Authority et al.,* No. 82-6499.

In its latest petition, the UTU relies on the very same arguments previously rejected by this Court in denying the two earlier Petitions for Writs of Certiorari. Moreover, those arguments, which related to the seniority roster established by the neutral referee, are irrelevant to the Special Court's May 23, 1983, decision (Pa1), which is the subject of the instant petition. As it relates to NJTRO, the May 23, 1983, decision discussed only the alleged right of employees to transfer back and forth between NJTRO and Conrail after they make an initial election to be employed by NJTRO.

As this Court is aware from the previous petitions, this matter arises under certain provisions of the Northeast Rail Services Act of 1981 (NRSA) (Pub. L. 97-35, Title XI, §§1131-1168, August 13, 1981) amending the Rail Passenger Service Act to add §§508-510, providing for the transfer of employees from Conrail to commuter author-

---

[3] Although at the time that Petition was filed, January 10, 1983, no final order had been entered by the Special Court with respect to ¶ 18(a) of the Petition for Review, the UTU's Petition dealt only with the merits of the action and did not address the other standards for consideration of preliminary injunctions. Moreover, the Special Court did enter its final order on February 9, 1983, dismissing ¶ 18(a), and this Court was so advised prior to its denial of a Writ of Certiorari.

ities. 45 U.S.C. §§588-590. These provisions were necessitated by another provision of NRSA relieving Conrail of any legal obligation to operate commuter service after January 1, 1983. 45 U.S.C. §744a. Prior to that date, Conrail had been required to operate commuter service under contracts with commuter authorities pursuant to §304 (c) of the Regional Rail Reorganization Act of 1973. 45 U.S.C. §744(c).

45 U.S.C. §§588-590 provided a three-step process for transferring employees from Conrail to commuter authorities. First, a factfinding panel was established to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." 45 U.S.C. §589. The second step was the negotiation of Implementing Agreements to determine the number of employees and to identify the specific employees to be transferred to commuter authorities. 45 U.S.C. §588. Those negotiations were to be held between commuter authorities and representatives of the various crafts or classes of employees of Conrail to be transferred to commuter authorities. If the negotiations did not result in an agreement by August 1, 1982, the dispute was to be submitted to a neutral referee for binding arbitration. 45 U.S.C. §588(d). The transfer of employees was to be completed by January 1, 1983. The final step in the process was the negotiation of a collective bargaining agreement with representatives of the crafts or classes to be transferred to the commuter authority. 45 U.S.C. §590.

The instant dispute arises out of the Implementing Agreement awarded by the neutral referee after NJTRO and the various unions representing employees to be transferred from Conrail to NJTRO were unable to reach an agreement pursuant to 45 U.S.C. §588. One of the neutral referee's tasks in determining the Implementing Agree-

ment for the transfer of employees from Conrail to NJ TRO, pursuant to that provision, was to:

> determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights . . . and ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority.

45 U.S.C. §588(c)(5) and (7). After reviewing the language of 45 U.S.C. §588(c)(7) which requires only that transferred employees shall retain seniority rights "on Conrail", the neutral referee found that such employees are limited to a transfer back to Conrail and that, after they do so, they will have no right again to transfer to NJTRO. (Ra4). It is that portion of the neutral referee's decision that was challenged in paragraphs 18(b) and (c) of the Petition for Review before the Special Court and which is, therefore, the subject of the present Petition for a Writ of Certiorari insofar as it is applicable to NJTRO.

Paragraphs 18(b) and (c) of the Petition for Review were dismissed by the Special Court on the motion of NJTRO for expedited determination. After noting the limited scope of review provided for the neutral referee's award (Pa4), the Special Court found that the issues raised by petitioner were indistinguishable from the same claims raised and rejected by the Court in *United Transportation Union* v. *Metro-North* (*Commuter Rail Division of the Metropolitan Transportation Authority*), 554 F. Supp. 429 (Sp. Ct., R.R.R.A., 1983). (Pa7). (UTU v. Metro-North). In that case the Special Court found that

> it is clear that Congress intended Section 508 [45 U.S.C. §588] to provide for negotiation of a limited transfer back to Conrail

554 *F. Supp.* at 432. The Court found no right to transfer back to NJTRO. For that reason it dismissed paragraphs 18(b) and (c) of the Petition for Review.

Summary of Argument

Petitioner seeks review of an award of a neutral referee made pursuant to a statute, 45 U.S.C. §588, which grants broad discretion to the referee to prescribe a procedure for transferring employees from Conrail to commuter agencies. The scope of review of that award is extremely narrow, being limited to a determination as to whether the referee failed to comply with the law, acted outside his jurisdiction, or acted corruptly. The arguments made by petitioner challenging the award are without merit and do not raise an important question of federal law.

ARGUMENT

A Writ of Certiorari should not issue to review the decision of the Special Court.

Initially, it must be emphasized that the issue presented by this latest petition is wholly irrevelant to the May 23, 1983, Special Court decision of which review is sought. In fact, the petition reads as though it is still challenging the prior Special Court decisions which upheld the right of the neutral referee to make some changes in seniority by creating a new seniority roster. Thus petitioner continues to argue, as it did twice before, that a new seniority sys-

tem may not be implemented because the statute requires seniority to be preserved to the extent possible. However, because the seniority roster issue had been previously disposed of, the Special Court did not deal with it in its May 23, 1983, decision, which held only that employees would have no right to return to NJTRO, if they chose to leave that entity and return to employment with Conrail. Indeed, it was the second time the UTU had brought the "flow back" issue before the Special Court. The Court initially ruled against the UTU in *UTU* v. *Metro North, supra*, and reaffirmed its ruling in the May 23 decision, noting that the UTU had made no attempt to distinguish the case. In its instant petition, the UTU makes no attempt to explain the relevance of its seniority roster arguments to the "flow back" decision at issue.

In making its argument regarding seniority rights petitioner states that the matter involves an important issue of constitutional law, but merely argues that the Special Court decision conflicts with general rules of statutory construction. Assuming, for the purpose of argument, that the issue is relevant, it is clear that, in making its argument, petitioner has taken the phrase "to the extent possible," in 45 U.S.C. §588(c)(5), out of context, and has ignored language found in 45 U.S.C. §588(c)(7). Thus, it is petitioner that has ignored the rule of statutory construction that, in interpreting a statute, the court should "look to the provisions of the whole law and its object and policy." *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975).

In its petition to this Court, petitioner argues, as it did in its prior petition and as did intervenor Woodard in her Petition for a Writ of Certiorari, that the provision in 45 U.S.C. §588(c)(5), requiring the preservation of prior seniority rights "to the extent possible," requires the maintenance of precisely the same seniority rights that existed

with Conrail. That argument ignores the statutory framework. In this case the provision for an Implementing Agreement was a second step in the process prescribed in 45 U.S.C. §§588-590 "prescribing the method under which Conrail employees are to be absorbed by Conrail's successors." *New Jersey Transit Rail Operations, Inc.* v. *International Brotherhood of Boilermakers, etc.*, 550 F. Supp. 1327, 1328 (Sp. Ct. 1982). The Implementing Agreement follows the findings of the factfinding panel appointed pursuant to 45 U.S.C. §589, to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." Further, 45 U.S.C. §590 provides for the negotiation of new collective bargaining agreements after the Implementing Agreements are reached. In so doing Congress intended that

> . . . existing Conrail agreements would not apply to Amtrak Commuter or to commuter authorities that chose to operate their own service.

Explanatory Statement, 97th Cong., First Sess., 127 Cong. Rec., S. 9062 (July 31, 1981). Thus, commuter authorities are not bound by seniority provisions in existing collective bargaining agreements. When the statute is read as a whole it shows that Congress intended the maintenance of existing seniority rights to be one, but not the paramount, goal to be achieved in designing the Implementing Agreement.

After reviewing the above cited statutory history and 45 U.S.C. §588(c)(5) in the context of all the provisions of 45 U.S.C. §§588-590, the Special Court has held that

> [t]he words "to the extent possible" in §508(c)(5) clearly contemplate that preservation of prior seniority rights is to be balanced against other considerations. . . . We find that Congress granted the neu-

> tral referees the discretion to determine the level of protection to be afforded to prior seniority rights.

UTU v. *SEPTA*, 555 F. Supp. at 1388. Clearly, petitioner's argument, were it relevant, is without merit. Equally clear is that the Special Court decision of May 23 is entirely consistent with the statute. In considering petitioner's claim that 45 U.S.C. §588 gives its members a right to move back and forth between NJTRO, Conrail and Amtrak, subsection (c) (7) must also be reviewed. That subsection contains a clear provision giving transferred employees one opportunity to transfer back to Conrail, but is silent on any further rights. In *UTU* v. *Metro-North, supra,* the Special Court recently discussed that provision and contrasted it to Section 1165 of NRSA.

> With regard to the legislative history of NRSA, which was prepared as part of the Omnibus Budget Reconciliation Act of 1981, the Conference Committee on Public Law 97-35 explained that Section 508 of RPSA:
>
> > . . . provide[s] generally for retention of seniority rights and the right to "bump" back *into Conrail* [emphasis in original] at least once every six months . . .
>
> Explanatory Statement, 127 Cong. Rec. H.5962 (daily ed., August 4, 1981) (emphasis added). *From the above statement it is clear that Congress intended Section 508 to provide for negotiation of limited transfer back to Conrail.* However, the above statement is also completely silent as to any right subsequently to transfer back to a commuter authority. At best, Section 508 is merely ambiguous. In contrast, in presenting Section 1165 of NRSA, the same Conference Committee stated that:

> Amtrak, Amtrak Commuter, and the Corporation will negotiate for the right of freight and passenger employees to move from any of these services to another every six months.
>
> Explanatory Statement, 127 Cong. Rec. H.5966 (daily ed., August 4, 1981). Thus, when these two statements are read together, it becomes clear that Congress, in enacting Section 508 of RPSA and Section 1165 of NRSA, envisioned two *different* [emphasis in original] "flow back" schemes depending upon the parties involved. Further, consistent with this interpretation, the Court is of the opinion that if Congress had intended Section 1165 of NRSA to apply to local commuter authorities, it would have so stated. (Emphasis supplied).

UTU v. *Metro North,* 554 F. Supp. at 432. In its Petition to this Court, the UTU again neither distinguishes nor attempts to dispute the persuasive reasoning of the Special Court. The statute is clear that employees transferred to NJTRO were not given a right to freely transfer between Conrail, Amtrak and NJTRO, but are limited to a one time opportunity to transfer back to Conrail.

In *New Jersey Transit Rail Operations, Inc.* v. *International Brotherhood of Boilermakers, etc., supra,* 550 F. Supp. at 1329, the Special Court recently discussed the standard for judicial review of an arbitrator's award pursuant to 45 U.S.C. §588. Recognizing that 45 U.S.C. §588 (d)(3) states that the award is to be "final and binding to the same extent as an award of an adjustment board under Section 3 of Railway Labor Act," the Special Court followed decisions of this Court stating the standard of review under that statute:

> Judicial review of arbitrators' determinations under that Act is very limited. In *Union Pacific Railroad Company* v. *Sheehan*, 439 U.S. 89, reh. den. 439 U.S. 1135 (1978), the Supreme Court held that in order to overturn such a decision there must be a showing either that the arbitrator failed to comply with the Act's requirements, failed to act within his jurisdiction or acted corruptly. 439 U.S. at 93.

The Court may not substitute its opinion for that of the referee. *Id.* at 1331. The above standard of review was used by the Special Court in finding that the referee had complied with 45 U.S.C. §588. In view of the broad discretion granted the neutral referee and the limited scope of review, the Special Court's decision finding that the neutral referee's award is consistent with the statute is clearly correct.

Because broad discretion was granted to the referee and the transfer process is a one-time event that will not be repeated, the issues raised by petitioner do not raise important questions of federal law so as to merit the granting of a Writ of Certiorari. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1954).[4]

---

[4] Petitioners also argue in the instant Petition for a Writ of Certiorari that implementation of the new seniority system will have a discriminatory impact on minorities and will violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§1981 and 1983, and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. However, the implementation of the new seniority system was not the subject of the May 23, 1983, Special Court decision but rather was the subject of the February 9, 1983, decision, to which the Court has already denied a Writ of Certiorari. Moreover, there is no evidence in the record that the denial of a right of employees to move back and forth between NJTRO and Conrail will have any discriminatory impact.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Portion of Petition of United Transportation Union for Review of Award of Neutral Referees Francis Quinn, Richard R. Kasher and Fred Blackwell

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
SECTION 1153

Civil Action No.

UNITED TRANSPORTATION UNION,
Petitioner,

—against—

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, NEW JERSEY RAIL OPERATIONS, INC.,
Respondents,

and

CONSOLIDATED RAIL CORPORATION,
Rule 19 Party

Petition Of United Transportation Union For Review Of Award Of Neutral Referees Francis X. Quinn, Richard R. Kasher, And Fred Blackwell Issued Pursuant To Section 508 Of The Rail Passenger Service Act As Amended By The Northeast Rail Service Act Of 1981 (NERSA)

• • •

Portion of Petition of United Transportation Union for Review of Award of Neutral Referees Francis Quinn, Richard R. Kasher and Fred Blackwell

18. The seniority provisions of the Kasher Award and Implementing Agreement are beyond the scope of the neutral referee's jurisdiction under Section 508 of RPSA in that they:

> (a) Created a Limited Order Selection List of UTU employees only for the initial purpose of going over to NJT. Once over, all prior seniority rights end and, contrary to Section 510, establishes a new type seniority system (dove tailed company-wide seniority). The Kasher award changes the seniority from job run to company run seniority, drastically changing and affecting the seniority of all transferring personnel in contradiction to the intent of NERSA. The award specifically directs that seniority prior rights will not be applicable after January 1, 1983;
>
> (b) Eliminate the prior seniority right of the employees to ebb and flow between NJT passenger and Conrail freight services;
>
> (c) Terminate all NJT seniority for some employees returning to Conrail.

All specifically prohibited and contraindicated by the Congress in Section 508(c)(5) and (7) of the RPSA, which subsections indicate that implementing agreements should protect prior seniority "to the extent possible" (5), and should insure the protection of prior seniority rights (7).

• • • •

Portion of Arbitration Opinion of Neutral Referee Kasher

IMPLEMENTING AGREEMENTS ARBITRATION
PURSUANT TO SECTION 508 OF THE RAIL
PASSENGER SERVICE ACT, AS AMENDED

In the Matter of an Arbitration Among

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.

—and—

CONSOLIDATED RAIL CORPORATION

—and—

THE LABOR ORGANIZATION REPRESENTATIVES
OF THE INVOLVED CRAFTS AND CLASSES OF
EMPLOYEES

ARBITRATION OPINION AND AWARDS
OCTOBER 14, 1982

• • •

2. Flow-back

Section 508(c)(7)(A) seeks to ensure, for employees transferring to NJTRO, the retention of prior seniority on Conrail, and to determine *the extent and manner* in which such employees shall be permitted to exercise such sen-

Portion of Arbitration Opinion of Neutral Referee Kasher

iority in order to provide them *at least one opportunity every six month period* to exercise previous freight seniority rights on Conrail.

In this tribunal's Opinion the language underscored above, standing alone, is susceptible to two interpretations. However, when the language is read in juxtaposition with Section 1165 of the same statute (NRSA), which provides that Intercity Passenger Service Employees, who have seniority in both freight and passenger service, may negotiate for "the right . . . to move from one service to the other once each six-month period", it is our Opinion that Section 508 can properly limit NJTRO employees to one voluntary exercise of seniority back to Conrail. Accordingly, we have incorporated in the implementing agreements attached to this Opinion, as the Awards, such a provision. We have not established a date certain in the future for extinguishment of this one time voluntary exercise of seniority.

• • • •